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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

MARCH 1990 EU
SECRETARY OF STATE
OF CALIFORNIA

In re:) 1992 OAL Determination No. 5
Request for Regulatory)
Determination filed by) [Docket No. 90-014]
Robert E. Hughes)
concerning alleged) April 6, 1992
underground regulations)
of the Hearing Aid) Determination Pursuant to
Dispensers Examining) Government Code Section
Committee/Division of) 11347.5; Title 1, California
Allied Health Professions) Code of Regulations,
and the Speech Pathology) Chapter 1, Article 3
and Audiology Examining)
Committee/Division of)
Allied Health)
Professions¹)
_____)

Determination by: MARZ GARCIA, Director

Herbert F. Bolz, Supervising Attorney
Mathew Chan, Staff Counsel
Kathleen Eddy, Staff Counsel
Regulatory Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not rules allegedly issued by the Hearing Aid Dispensers Examining Committee/Division of Allied Health Professions and the Speech Pathology and Audiology Examining Committee/Division of Allied Health Professions concerning the use of hearing tests and examination procedures for hearing aid dispensers are "regulations" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that a few of the challenged rules fall within the definition of a "regulation" requiring adoption under the Administrative Procedure Act; however, the greater part of the challenged rules do not, because they are not standards of general application or they merely provide information or restate existing law.

THE ISSUE PRESENTED²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not rules allegedly adopted by the Hearing Aid Dispensers Examining Committee/Division of Allied Health Professions ("HADEC") and the Speech Pathology and Audiology Examining Committee/Division of Allied Health Professions ("SPAEC") concerning the use of hearing tests and examination procedures for hearing aid dispensers are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA").⁴

THE DECISION^{5, 6, 7, 8}

OAL finds that:

- (1) HADEC's and SPAEC's quasi-legislative enactments are generally required to be adopted pursuant to the APA;
- (2) the following challenged rules are "regulations" as defined in the key provision of Government Code section 11342, subdivision (b):
 - from HADEC's "Written and Practicum Examination Information;"
 - the "WRITTEN TEST" portion;
 - the "PRACTICAL SKILLS TEST (PRACTICUM)" portion;
 - rule requiring applicants to bring a suitable hearing aid;
 - as reflected in the attachments to the Request and the Division's Response;
 - rule requiring fingerprint verification and payment of a \$19.50 fee for such verification;
- (3) the following challenged rules are not "regulations:"
 - from minutes of HADEC's meeting of January 27, 1990:
 - the "Tympanometry Statement;"
 - the discussion on "Division Authority;"
 - the discussion on "Legal Opinion Regarding Advertising;"

- from HADEC's "Written and Practicum Examination Information;"
 - alleged rule requiring applicants to serve as subjects for other applicants;
 - rule requiring persons who have completed the examination to exit without discussing the examination with other applicants.
- from the allegations made by the Requester:
 - rule employing hearing aid operators or employees as "proctors" or "commissioners" to give the examination;
 - rule to determine the competency of a hearing aid dispenser to supervise a trainee based upon the examination performance of another trainee already supervised by that dispenser;
 - rule to determine the economic viability of a hearing aid company;
 - rule to determine the competency of a hearing aid dispenser to supervise a trainee-applicant based upon the economic viability of the company the hearing aid dispenser is affiliated with or operates;
 - rule to determine whether withdrawal of the temporary license of a trainee-applicant is appropriate based upon the economic viability of the company providing the trainee's supervision;
 - rule permitting the finding of a fact based on verification of a complaint against a licensee without notice and the application of a sanction without a hearing;
- (4) no exceptions to the APA requirements apply;
- (5) the challenged rules which constitute "regulations" violate Government Code section 11347.5, subdivision (a).⁹

R E A S O N S F O R D E C I S I O N

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

"The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) . . . The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]¹⁰

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

The Medical Board of California ("Board"), which consists of (1) the Division of Medical Quality, (2) the Division of Licensing, and (3) the Division of Allied Health Professions, is one of numerous state agencies under the Department of Consumer Affairs.¹¹ The Division of Allied Health Professions ("Division") is responsible for, among other things, "the activities of examining advisory committees and nonphysician licentiates under the jurisdiction of the board."¹² Both the Hearing Aid Dispensers Examining Committee ("HADEC") and the Speech Pathology and Audiology Examining Committee ("SPAEC") are agencies under the jurisdiction of the Division.¹³ The function of HADEC is to "prepare, approve, grade, and conduct examinations of applicants for a hearing aid dispenser's license."¹⁴ Similarly, SPAEC is responsible for the licensing of speech pathologists and audiologists.¹⁵ A member of HADEC serves as liaison to SPAEC for the purpose of coordinating the policies of the committees regarding the fitting and dispensing of hearing aids.¹⁶

Authority¹⁷

The Division has been granted fairly broad rulemaking authority. Business and Professions Code section 2018 empowers the Division to "adopt, amend, or repeal, in accordance with the provisions of the Administrative Procedure Act, such regulations as may be necessary to enable it to carry into effect the provisions of law relating to the practice of medicine."

While HADEC itself has no rulemaking authority, it may make recommendations to the Division to promulgate rules and regulations to implement the hearing aid dispenser statutes. Business and Professions Code section 3328 reiterates that such rules and regulations shall be adopted in accordance with the APA.

Unlike HADEC, SPAEC enjoys independent rulemaking power. Business and Professions Code section 2531.95 provides that SPAEC shall adopt regulations as may be necessary to effectuate its purposes in accordance with the APA.

Background: This Request for Determination

This request for determination was brought by Robert E. Hughes ("Requester"). The Requester alleges that both SPAEC and HADEC have adopted "'underground' and/or 'unwritten' rules in violation of the Administrative Procedures Act." He quotes language contained in the minutes of HADEC's

January 27, 1990 meeting and HADEC's "Written and Practicum Examination Information" ("examination information material") as examples of "underground regulations." From the January 27, 1990 minutes, the Requester challenges the statement jointly adopted by HADEC and SPAEC regarding acoustic immittance testing ("tympanometry statement"). The tympanometry statement reads as follows:

"Acoustic immittance testing for other than the purpose of fitting or selling hearing aids exceeds the scope of practice of hearing aid dispensing. Violations of these limitations is the unlicensed practice of audiology and is a misdemeanor."

From those minutes, the Requester also challenges the discussion of "Division Authority" and "Legal Opinion Regarding Advertising" presented by Greg Gorges, Legal Counsel.

The Requester challenges practically every provision contained in HADEC's examination information material. Briefly, this material states that the examination consists of two parts. On the written examination, "a minimum score of 70% in each section of the written test" (emphasis in original) is required to pass the examination. The sections of the examination are listed in the material:

- "1. Basic Physics of Sound...
2. The Anatomy and Physiology of the Ear...
3. Hearing Aid Function and Evaluation...
4. Knowledge of the Hearing Aid Dispenser License Law and the Regulations Adopted Pursuant to It..."

The second part of the examination is a Practical Skills Test (Practicum). The information contained in this part of the material will be discussed in the analysis of the material.

Though not reflected in any of the submitted documents, the Requester has also alleged the following:

1. "HADEC has implemented an 'underground' and/or 'unwritten' rule of employing hearing aid company operators or employees to give the examinations and call these persons 'proctors' or 'commissioners.'"
2. "HADEC has implemented an 'underground' and/or 'unwritten' rule of charging a fee of \$19.50, in addition to the fees allowed in Section 1399.129, to have an applicants [sic] fingerprints checked at the Department of Justice. . . ."

3. "HADEC has an 'underground' or 'unwritten' rule to determine the competency of a hearing aid dispenser to supervise a trainee-applicant (new employee) based on how well a trainee-applicant (other employee) under their supervision did on an exam administered by the committee."
4. "HADEC has an 'underground' or 'unwritten' rule to determine the the [sic] economic viability of a hearing aid company."
5. "HADEC has an 'underground' or 'unwritten' rule to determine the competency of a licensed hearing aid dispenser to supervise a trainee-applicant depending upon the economic viability of the company that the licensee is affiliated with or operates."
6. "HADEC has an 'underground' or 'unwritten' rule that enables it to find a fact based on verification of a complaint against a licensee by an investigator of the Department of Consumer Affairs, to find a fact without notice that a matter is pending, and to apply a sanction without a hearing."
7. "HADEC has an 'underground' or 'unwritten' rule to determine that they may withdraw a temporary license depending upon whether or not the company he/she is affiliated with has been determined economically viable, and to have assurances that the company will be able to provide adequate consumer services and, if need be, reimbursements or refunds when required."

On January 11, 1991, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,¹⁸ along with a notice inviting public comment. A public comment, dated February 6, 1991, was submitted by the Requester.^{19, 20} Response to the Request for Determination ("Response") was submitted on February 25, 1991, by the Department of Consumer Affairs on behalf of HADEC and SPAEC.

II. DISCUSSION

Government Code section 11347.5 governs OAL's response to requests for determinations. Subsection (b) of section 11347.5 states as follows:

"If . . . [OAL] is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to . . . [the Administrative Procedure Act (hereafter the "APA")], .

. . [OAL] may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

Note that OAL has simply been authorized to determine whether a challenged rule is or is not a "regulation" under the APA. OAL lacks authority either to prevent the use of a rule or policy declared to be an invalid "regulation" in violation of section 11347.5, or to impose penalties upon such use. Likewise, OAL lacks authority to enforce the application of existing regulations properly adopted pursuant to the APA. That authority rests with the courts.

The Requester, in a comment submitted to OAL, alleges that the manner in which statutes and regulations that regulate the sale and fitting of hearing aids in California have been implemented and enforced renders them unconstitutional. Clearly, that issue is beyond the scope of Government Code section 11347.5 and we will not address it.²¹

The key issues in this determination are:

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO HADEC'S AND SPAEC'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULES IDENTIFIED IN THE REQUEST FOR DETERMINATION CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THOSE CHALLENGED RULES WHICH CONSTITUTE "REGULATIONS" FALL WITHIN AN EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO HADEC'S AND SPAEC'S QUASI-LEGISLATIVE ENACTMENTS.

Government Code section 1000 states in part:

"As used in this title [Title 2. 'Government of the State of California'] 'state agency' includes every state office, officer, department, division, bureau, board, and commission." [Emphasis added.]

Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code.

Both HADEC and SPAEC are clearly "state agencies" as that term is defined in Government Code section 11000. Further, Government code section 11342, subdivision (b), provides that, for purposes of the APA, the term "state agency" applies to all state agencies, except those in the "judicial or legislative departments."²² Since neither HADEC nor SPAEC are in the judicial or legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the quasi-legislative enactments of those entities.²³

More specifically, additional statutory language expressly mandates compliance with the APA. With respect to regulations adopted by the Division, based on the recommendation of HADEC, Business and Professions Code section 3328 states:

" . . . The rules and regulations shall be adopted, amended, or repealed in accordance with [the APA]." [Emphasis added.]

With respect to regulations adopted by SPAEC, Business and Professions Code section 2531.95 states:

" . . . In adopting regulations the committee shall comply with [the APA]." [Emphasis added.]

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES IDENTIFIED IN THE REQUEST FOR DETERMINATION CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342,

unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]"
[Emphasis added.]

In Grier v. Kizer,²⁴ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?²⁵

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA."
[Emphasis added.]²⁶

A. Are the Challenged Rules Standards of General Application or a Modification or Supplement to Such Standards?

We conclude that some of the challenged rules are standards of general application, while others are not.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²⁷

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The following challenged rules undoubtedly affect all hearing aid dispensers and applicants for licensure as hearing aid dispensers throughout California:

- from HADEC's "Written and Practicum Examination Information;"
 - the "WRITTEN TEST" portion;
 - the "PRACTICAL SKILLS TEST (PRACTICUM)" portion;
 - rule requiring applicants to bring a suitable hearing aid;
- as reflected in the attachments to the Request and the Division's Response;
 - rule requiring fingerprint verification and payment of a \$19.50 fee for such verification;
- from the allegations made by the Requester:
 - rule employing hearing aid operators or employees as "proctors" or "commissioners" to give the examination;
- from minutes of HADEC's meeting of January 27, 1990:
 - the "Tympanometry Statement;"
 - the discussion on "Division Authority;"
 - the discussion on "Legal Opinion Regarding Advertising;"
- from HADEC's "Written and Practicum Examination Information;"
 - alleged rule requiring applicants to serve as subjects for other applicants;
 - rule requiring persons who have completed the examination to exit without discussing the examination with other applicants.

Accordingly, these challenged rules have general application and meet the first part of the two-part test.

The remaining challenged rules do not have general application; therefore, they are not rules which must be adopted pursuant to the APA. These challenged rules are:

- from the allegations made by the Requester:
 - rule to determine the competency of a hearing aid dispenser to supervise a trainee based upon the examination performance of another trainee already supervised by that dispenser;
 - rule to determine the economic viability of a hearing aid company;
 - rule to determine the competency of a hearing aid dispenser to supervise a trainee-applicant based upon the economic viability of the company the hearing aid dispenser is affiliated with or operates;
 - rule to determine whether withdrawal of the temporary license of a trainee-applicant is appropriate based upon the economic viability of the company providing the trainee's supervision;
 - rule permitting the finding of a fact based on verification of a complaint against a licensee without notice and the application of a sanction without a hearing.

We will discuss briefly each challenged rule.

- from the allegations made by the Requester:
 - rule to determine the competency of a hearing aid dispenser to supervise a trainee based upon the examination performance of another trainee already supervised by that dispenser;

The Requester refers to a letter written by Margaret McNally (former Executive Officer for the Committee) to Mary Hughes, dated September 19, 1989 (attachment #4 to the request) as evidence of the rule. Examination of that letter shows that Ms. McNally denied Mrs. Hughes application to supervise Anthony Sotelo under regulation section 1399.115 (renumbered as 1399.114 in 1991), subsection (d) of Title 16 of the CCR. That provision states:

"An excessive number of trainee-applicants under the supervisor may preclude a finding the board

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[sic] that the trainee-applicants will be adequately supervised and trained."

The September 19, 1989, letter pointed out that Mrs. Hughes was already supervising two trainees. Additionally, since one of the trainees had failed the written examination for licensure, Mrs. Hughes would be required to be physically present whenever that trainee performed procedures constituting the fitting or selling of hearing aids under regulation section 1399.119, subsection (d) of Title 16 of the CCR.

Clearly, the Division merely applied the provisions of existing law to the specific facts in Mrs. Hughes' case. The result does not apply to all members of a class, kind or order; it is not a standard of general application which would require adoption of the rule pursuant to the APA.

Whether the Division applied the law correctly--i.e., whether the facts justify a finding that a third trainee would constitute an excessive number of trainee-applicants under regulation section 1399.114, subsection (d), in this case--is not for us to decide.

- rule to determine the economic viability of a hearing aid company;
- rule to determine the competency of a hearing aid dispenser to supervise a trainee-applicant based upon the economic viability of the company the hearing aid dispenser is affiliated with or operates;
- rule to determine whether withdrawal of the temporary license of a trainee-applicant is appropriate based upon the economic viability of the company providing the trainee's supervision.

The Requester offers a letter written by Ms. McNally, dated October 25, 1989 (attachment #5 to the Request) as evidence of the adoption of the challenged rules by the Division. Again, these rules merely reflect the application of existing law to a particular fact situation instead of the adoption of standard policies.

The October 25, 1989, letter also pertains to a request to supervise Anthony Sotelo as a trainee-applicant. The letter explains that although the circumstances for denial of the previous application for training Mr. Sotelo have since changed, new facts justify denial of the request on different grounds. The letter cites Business and Professions Code section 3357 and regulation section

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1399.115, subsection (a)(2), of Title 16 of the CCR. The Division argues that the financial instability of the hearing aid company sponsoring Mr. Sotelo, as shown by its filing of bankruptcy and the closing of its doors for business, indicates that the proper supervision would not have been provided as required by law. The same reasoning, as explained by the Division, justified the withdrawal of the temporary license previously issued to Mr. Wesley Wendell.

As previously stated, we do not rule as to whether or not the Division properly applied the law. It is sufficient that we determine that the Division merely applied the law to a particular set of circumstances, rather than adopting standard policies.

- rule permitting the finding of a fact based on verification of a complaint against a licensee without notice and the application of a sanction without a hearing.

The challenge stems from a letter written by Ms. McNally, dated August 18, 1989 (attachment #6 to the Request). The letter pertained to the supervision applications for Robert B. Johnson and James Hunter. It states in part:

"We must inform you that you are restricted to one trainee per Section 1399.116(a)(2), of the Hearing Aid Dispensers Regulations which states, 'A licensed hearing aid dispenser shall not supervise more than one trainee-applicant at any one time unless a specific waiver has been granted by the committee. Criteria for such a waiver shall be that the supervising dispenser has not been the subject successful disciplinary action or of a complaint which has been investigated and verified by the Investigation Division of the Board or the Department's Division of Investigation within the preceding three (3) years.'

The investigation division of the Board of Medical Quality Assurance has verified that you were in violation of 3401 [h] of the Hearing Aid Dispensers Laws You employed Tom Buchalew to sell hearing aids and he did so although Mr. Buchalew was never licensed by the state to perform those activities."

It is apparent that the Division did no more than apply an existing regulation to deny the submitted request for supervision. Again, we make no judgment of the Division's application of existing law.

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Each of the rules noted above appears to be simply the application of the existing law to the specific facts of the Requester's case. Such an application of the law on a case-by-case basis is limited to one person and, therefore, is not a "standard of general application" and does not meet the first part of the two-part test. Therefore, none of these "rules" must be adopted as regulations pursuant to the APA.

B. Part Two - Do the Challenged Rules Establish Rules Which Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency or Which Govern the Agency's Procedure?

Minutes of the January 27, 1990 HADEC Meeting

The Division has argued that the challenged tympanometry statement reflected in the minutes of the January 27, 1990 HADEC meeting is not a "regulation" because it merely repeats existing law. We agree.

As stated in 1989 OAL Determination No. 15:

In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and "its application." Such an enactment is simply "administrative" in nature, rather than "quasi-judicial" or "quasi-legislative." If, however, the agency makes new law, i.e., supplements or "interprets" a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power.

Fundamental to the issue of whether or not provisions contained in [a challenged rule] supplement or interpret the law enforced or administered by the agency, is whether or not the law involved needs such supplementation or interpretation. In a previous Determination we stated:

"If a rule simply applies an existing constitutional, statutory or regulatory requirement that has only one legally tenable 'interpretation,' that rule is not quasi-legislative in nature--no new 'law' is created." [Footnote omitted. Emphasis added.]²⁸

Statutory law provides that the principles, methods, and procedures of testing related to hearing and hearing disorders fall within the practice of audiology.²⁹ Such

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testing, without licensure as an audiologists, is a violation of the law and constitutes a misdemeanor.³⁰ A limited exception, however, is provided for hearing aid dispensers. Business and Professions Code section 2530.5, subdivision (b), states in part:

"Nothing in this chapter shall be construed to prevent a licensed hearing aid dispenser from engaging in testing of hearing and other practices and procedures used solely for the fitting and selling of hearing aids." [Emphasis added.]

The tympanometry statement prohibits hearing aid dispensers from performing acoustic immittance testing for other than the purpose of fitting and selling hearing aids. According to the information provided, acoustic immittance testing is a type of hearing test. Since the application of section 2530.5 is not restricted to specific types of hearing tests, the first sentence of the tympanometry statement does not in anyway affect the limited exception given to hearing aid dispensers under existing law. The second sentence of that statement merely reflects application of Business and Professions Code sections 2532, subdivision (a), and 2533.3.

The other portions of the minutes of HADEC's January 1990 meeting challenged by the Requester read as follows:

"Agenda Item No. 1-90-8 Division Authority

"[Greg] Gorges [Legal Counsel for the Department of Consumer Affairs] discussed Section 2006 regarding the Division of Allied Health Professions (DAHP) request for clarification of its authority over the Allied Health Committees and the Boards (AHLP's). DAHP authority over AHLP's is limited, although it retains regulatory authority over HADEC. DAHP has established an ad hoc committee to look into its future role and options under consideration include its possible dissolution, the reconfiguration of its role and duties, or the extension of its authority over the AHLP's. Division member, former Senator Alfred Song, supports the latter position and wishes the Medical Board to carry legislation to amend each individual practice act in order to extend DAHP authority. Song's bill would attempt to limit the increasing autonomy of the AHLP's, and would thereby lead to considerable opposition from them. McNally will attend the Division meeting on April 19th and report back to the committee.

"Gorges' legal opinion addressed to Ken Wagstaff, Executive Director of the Medical Board (dated 11/16/89) specifically outlines the jurisdictional areas of the DAHP:

"Hearing Aid Dispensers Examining Committee:
Under Section 3352 the committee has the authority to evaluate applicants for licensure. Under Section 3360 the committee has the authority to administer the licensure examinations. Under Section 3329 and 3401 the committee has the authority to take disciplinary actions against licensees. This authority for enforcement was transferred from the division to the committee effective 1 January 1989. With the exception of regulations pertaining to continuing education, the division has the authority to adopt, amend and repeal regulations pertaining to the regulation of hearing aid dispensers.

Legal Opinion Regarding Advertising

"Gorges commented that his legal opinion (included in the agenda packets) is a complicated constitutional law issue. The state regulates advertising to the extent that it is false and misleading. Advertising 'Free Hearing Tests' may also be false and misleading if the cost of the hearing test is included in fees charged to patients.

"Gorges added that if price quotations are advertised, they must be exact. He reiterates that Code Section 651(c) states that price advertising may not contain misleading discounts, that the price of each product shall be clearly identified and shall include the charges for any related professional services, including dispensing and fitting services."

We initially note that the no specific rules can be gleaned from the above-quoted portions of the minutes of HADEC's meeting. The above represents discussion of existing law and its possible application. It was presented as information at the hearing. The discussion does not reflect the adoption of any rules or policies by HADEC.

Examination Information Material

The material provides:

"I. WRITTEN TEST

"The 90 minute written examination consists of approximately 100 multiple-choice questions, and is given in the morning. In order to pass the examination, candidates must receive a minimum score of 70% in each section of the written test. Following is a synopsis of each section of the written exam:

"1. Basis physics of Sound. This section includes questions from subject matter concerning sound; measurement of sound; frequency; speech frequencies; the physical parameters of hearing aid components.

"2. The Anatomy and Physiology of the Ear and Pathologies of the Ear as They Relate to Hearing Aids. This section includes questions from subject matter concerning all parts of the outer, middle, and inner ear and central auditory systems; the causes and types of hearing loss.

"3. Hearing Aid Function and Evaluation. This section includes questions from subject matter concerning:

"Hearing Aid Design (types of hearing aids and the purpose of each hearing aid component).

"Hearing Aid Function (electroacoustic evaluation and function of aids; hearing aid frequency emphasis).

"Hearing Aid Fitting (hearing aid fitting techniques; audiogram interpretation; masking and air-bone gap; testing procedures to determine hearing aid candidacy).

"4. Knowledge of Hearing Aid Dispenser License Law and the Regulations Adopted Pursuant to It. This section includes questions from content provided in the Hearing Aid Dispensers License Law, which provided to all applicants for licensure.

". . ." [Emphasis in original.]

The Division argues that the "written test" portion of the examination information material restates the areas and subjects of the written examination which are set forth in Business and Professions Code section 3353. True. However, the above-quoted language does more than that. It establishes the amount of time given to take the test, the number and type of questions which make up the test, and the minimum score a candidate must get in each section of the written test in order to pass.³¹ The above-quoted provision clearly implements and makes specific section 3353.

The examination information material also provides:

"II. PRACTICAL SKILLS TEST (PRACTICUM)

"The practical examination, which takes approximately 60 minutes, will follow completion of the written examination. In order to pass the practicum examination, you must receive an overall score of 70% and you must be able to successfully complete all of

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the skill areas determined by HADEC to be necessary for safe and competent practice. These skill areas are so important that the committee has designated them 'critical skill areas.' If you are unable to perform any of the critical skill areas of the practicum examination in an adequate and competent manner, you will automatically fail the practicum. These skill areas are noted in the descriptions of the examination which follow."

The Division argues that the requirement of the practical skills test is simply the administration of the "demonstration of proficiency" referred to in Business and Professions Code section 3353, subdivision (b)(2). That subdivision provides:

"(b) Each applicant shall take and pass the following examinations:

"(2) A demonstration of proficiency complied at the direction of the committee, including, but not limited to, the following:

"(A) The procedures and use of equipment established by the committee for the fitting or selling of hearing aids.

"(B) The techniques for taking earmold impressions."

We note that the quoted language of the examination information material outlines what is necessary in order to pass the "demonstration of proficiency" portion of the exam. It requires that an applicant receive an overall score of 70% and demonstrate competence in those "critical skill areas" which have been established by HADEC.

The Division points out that Business and Professions Code section 3361 already requires an applicant to obtain an average of 70 percent in every subject upon which he or she is examined. It has not pointed out, however, any provision of law which also requires the applicant to successfully complete all specified areas of skill designated as "critical skill areas" in order to pass the exam. The additional requirement clearly goes beyond section 3361. Applying existing law, a person who successfully completed all but one "critical skills area" could possibly still attain an average score of 70% and thus pass the exam.³² That same person would not pass under the policy adopted by HADEC.

The requirement to successfully complete each "critical skill area" as well as the establishment of those areas

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themselves³³ implement and make specific section 3361, subdivision (b).

The practical test portion of the examination information material also provides:

"Each examinee is required to provide the Committee with an audiogram from a test performed on the examinee. This completed audiogram should be brought with you to the examination and it must be on the enclosed form provided by the Committee. The audiogram must be taken of your own ear with puretone threshold readings of frequencies 250, 500, 1000, 2000, and 4000Hz. The examination will require you to provide your own properly functioning audiometer. You will not be allowed to share an audiometer with another candidate or use a commissioner's audiometer. The audiometer you bring must provide for both air and bone conduction testing. The audiometer must have a 10 dB output capacity, conform to the ANSI 1969 Standards, and must have been calibrated within the past 12 months. Unless you have written certification you will not be allowed to use the audiometer.

The Division argues that the requirement to bring ones own audiogram merely represents the application of existing law. We disagree. Business and Professions Code section 3353, subdivision (b)(2), provides for a practical examination which covers, among other things, procedures and use of equipment for the fitting and selling of hearing aids and the techniques for taking earmold impressions. While regulation section 1399.120, subsection (f), outlines the areas included in the proficiency examination, it does not specify how those areas are to be tested. The requirement that the applicant bring an audiogram of the applicant's own ear with puretone threshold readings of frequencies 250, 500, 1000, 2000, and 4000Hz on a form provided by the committee goes beyond what is covered in existing statutes or regulations.

The Division also argues that the requirement to bring (1) an audiometer which conforms with ANSI 1969 standards, provides for both air and bone conduction testing, and has a 10dB output capacity and (2) written certification that the audiometer has been calibrated within the past 12 months, is not part of the examination per se but only an instruction as to what tools are needed to take the examination. It defends the rule prohibiting one candidate from borrowing an audiometer from another candidate or the commission by arguing that "if a sizeable number of the examinees did not bring their own audiometers, . . .the administration of the examination would be seriously impaired."

Whether the requirement to bring an audiometer which meets the listed specifications along with written certification of calibration is considered part of the exam or not is irrelevant. The practical effect of the stated rules is that applicants who do not bring such items to the examination will not be permitted to complete the exam for licensure. That rule is presently not covered under the existing law. Again, the above-quoted rules implement and make specific Business and Professions Code section 3353.

Other provisions contained in the examination information material pointed out by the Requester as "underground regulations" require that applicants (1) bring a hearing aid (2) serve as a subject for the next examinee, and (3) leave the examination area without discussing the practical examination with waiting candidates.

With respect to the requirement that applicants bring a suitable current model behind-the-ear or in-the-ear hearing aid, we apply the same reasoning as above. Since the rule spells out a requirement for completion of the examination, it implements and makes specific existing law.

The other provisions do not appear to fall within the definition of a "regulation." The Division states that applicants are asked to serve as subjects for other applicants but are not required to do so in order to pass the exam. This view is supported by the fact that the challenged provision was contained in a "NOTE" following the stated requirements for taking and passing the exam. With respect to the requirement to leave the examination area without discussing the exam with other applicants, we agree with the Division that the stated rule is a reflection of Business and Professions Code sections 496 and 123, subdivision (b).

Allegations Made By Requester

- rule employing hearing aid operators or employees as "proctors" or "commissioners" to give the examination.

Business and Professions Code section 111 currently states:

Unless otherwise expressly provided, any board may, with the approval of the appointing power, appoint qualified persons, who shall be designated as commissioners on examination, to give the whole or any portion of any examination. A commissioner on examination need not be a member of the board but he shall have the same qualifications as one and shall be subject to the same rules.

By appointing licensed hearing aid dispensers, the Division is merely exercising its statutory authority. It appears that the Requester is really arguing that there should be a rule which prohibits the Division from hiring employees or operators of hearing aid companies as examination commissioners in order to avoid potential conflicts of interest. That concern should be handled by a petition³⁴ to the Division to formally adopt such a rule in compliance with the APA; the absence of such a rule is not an "underground regulation."

THIRD, WE INQUIRE WHETHER THOSE CHALLENGED RULES WHICH CONSTITUTE "REGULATIONS" FALL WITHIN AN EXCEPTION TO THE APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.³⁵ Rules concerning certain activities of state agencies -- e.g., "internal management" -- are not subject to the procedural requirements of the APA.³⁶

The issue of the applicability of exceptions to the APA requirements were not raised by either the Requester or the Division. Our independent review discloses no applicable exceptions.

Having found certain challenged rules to be "regulations" and not exempt from the requirements of the APA, we conclude that those rules violate Government Code section 11347.5, subdivision (a).

III. CONCLUSION

For the reasons set forth above, OAL finds that:

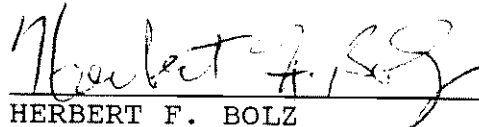
- (1) HADEC's and SPAEC's quasi-legislative enactments are generally required to be adopted pursuant to the APA;
- (2) the following challenged rules are "regulations" as defined in the key provision of Government Code section 11342, subdivision (b):
 - from HADEC's "Written and Practicum Examination Information;"
 - the "WRITTEN TEST" portion;
 - the "PRACTICAL SKILLS TEST (PRACTICUM)" portion;

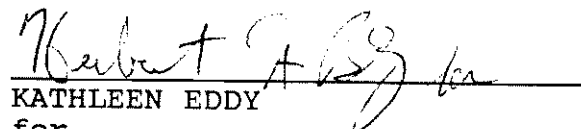
- rule requiring applicants to bring a suitable hearing aid;
 - as reflected in the attachments to the Request and the Division's Response;
 - rule requiring fingerprint verification and payment of a \$19.50 fee for such verification;
- (3) the following challenged rules are not "regulations:"
- from minutes of HADEC's meeting of January 27, 1990:
 - the "Tympanometry Statement;"
 - the discussion on "Division Authority;"
 - the discussion on "Legal Opinion Regarding Advertising;"
 - from HADEC's "Written and Practicum Examination Information;"
 - alleged rule requiring applicants to serve as subjects for other applicants;
 - rule requiring persons who have completed the examination to exit without discussing the examination with other applicants.
 - from the allegations made by the Requester:
 - rule employing hearing aid operators or employees as "proctors" or "commissioners" to give the examination;
 - rule to determine the competency of a hearing aid dispenser to supervise a trainee based upon the examination performance of another trainee already supervised by that dispenser;
 - rule to determine the economic viability of a hearing aid company;
 - rule to determine the competency of a hearing aid dispenser to supervise a trainee-applicant based upon the economic viability of the company the hearing aid dispenser is affiliated with or operates;

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- rule to determine whether withdrawal of the temporary license of a trainee-applicant is appropriate based upon the economic viability of the company providing the trainee's supervision;
 - rule permitting the finding of a fact based on verification of a complaint against a licensee without notice and the application of a sanction without a hearing;
- (4) no exceptions to the APA requirements apply;
- (5) the challenged rules which constitute "regulations" violate Government Code section 11347.5, subdivision (a).

DATE: April 6, 1992


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1. This Request for Determination was filed Robert E. Hughes, 360 Wisconsin #202, Long Beach, CA 90814, (213) 434-7531. The Hearing Aid Dispensers Examining Committee and the Speech Pathology and Audiology Examining Committee were represented by Gregory Gorges, staff counsel for the Department of Consumer Affairs, 1020 N Street, Sacramento CA 95814, (916) 445-4216.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "134" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No. 46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

In January 1992, a fourth survey of governing case law was published in 1992 OAL Determination No. 1 (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

Authorities discovered since fourth survey

One case and one statute underscore the basic principle that all state agency rules which meet the statutory definition of "regulation" must either be (1) expressly exempted by statute or (2) adopted pursuant to the Administrative Procedure Act and printed in the California Code of Regulations. In Engelmann v. State Board of Education (1991) 2 Cal.App.4th 47, 3 Cal.Rptr.2d 264, petition for review denied March 19, 1992, the Third District Court of Appeal held that state textbook selection guidelines were "regulations" which had to be adopted in compliance with the APA. In Engelmann, the Third District expressly overruled its 1973 decision in American Friends Service Committee v. Procunier insofar as the 1973 decision suggested that "specific" provisions in agency enabling acts could be held to control over the "general" APA (Government Code section 11346). In section 11346, the Court noted, there is an express basis for applying the APA to every other statute.

The second recent development is the legislative response to 1990 OAL Determination No. 12, which concluded that certain rules issued by the Department of Finance violated the APA. In urgency legislation (SB 327/1991), the Legislature expressly exempted such Department of Finance rules from APA rulemaking requirements. See Government Code section 11342.5.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"Determination" means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." (Emphasis added.)

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL (916-323-6225) for a small charge.

5. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket

No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an

"underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of his Determination.
9. Government Code section 11347.5 provides:
 - "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation[''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.
 - "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a ['']regulation[''] as defined in subdivision (b) of Section 11342.
 - "(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.
11. Business and Professions Code sections 101, 2001 and 2003.
12. Ibid., section 2006.

13. Ibid., sections 2531, 3302 and 3320.
14. Ibid., section 3353.
15. Ibid., section 2531.3, 2532-2535.4.
16. Ibid., section 2531.05.
17. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices. Individual agencies--not OAL--maintain individual agency rulemaking mailing lists.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

18. California Regulatory Notice Register 91, No. 2-Z, January 11, 1991, p. 69.

19. The Requester has alleged the existence of other "underground regulations being implemented by the committees. As those alleged underground regulations were not challenged in the submitted Request for Determination, we shall nit review them here. The Requester, however, is free to formally challenge those rules by submitting another Request for Determination to do so.

The requester has also asked that OAL find the committees' rules to be in violation of the "consistency" standard of the APA. We cannot do so in this determination. Unlike our review of proposed regulations submitted for approval pursuant to Government Code section 11349.1, our review of challenged rules under the determinations program is restricted to a finding of whether or not the challenged rule is or is not a "regulation" which would be unenforceable unless adopted pursuant to the APA

20. Other public comments were submitted by Douglas S. Drummand, Long Beach City Councilman and Walter K. Cos of Salt Lake City, Utah. These comments, however, were not submitted in accordance with Title 1, California Code of Regulations section 122(b) and (c). Corrections to the comments were received after the comment deadline established pursuant to Title 1 California Code of Regulations section 124. Therefore, pursuant to section 126, the comments were not considered in making this determination.
21. The Requester also asks that OAL find the committees' rules to be in violation of the "consistency" standard of the APA. We cannot do so in this determination. Unlike our review of files submitted for approval pursuant to Government Code section 11349.1, our review of challenged rules under the determinations program is restricted to a finding of whether or not the challenged rule is or is not a "regulation" which would be unenforceable unless adopted pursuant to the APA. The Requester has apparently confused OAL's role as a reviewer of submitted regulations for approval from OAL's role in reviewing submitted requests for determinations. This is evidenced by the Requester's reference to an OAL disapproval decision as a "determination." (See public comment, pp. 10-11.)
22. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

1989 OAL Determination No. 4 was upheld in May 1991 in a decision of the San Francisco Superior Court, which is currently being appealed by the losing side. State Water Resources Control Board v. Office of Administrative Law, SCN 906452; 1st DCA, Div. 1--No. AO 54599. Copies of the 30-page trial court statement of decision are available from OAL (phone Melvin Fong at (916) 324-7952) for a charge of \$7.00 (postage included).

23. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
24. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
25. The history note to Chapter 5 ("Administrative Adjudication," sections 11500 et seq.) of Title 2, Division 3, of the Government Code, contained in West's annotated codes, reveals that Chapter 5 was originally added under the heading "Administrative Procedure."
26. Supra, 219 Cal.App.3d at p. 438, 268 Cal.Rptr. at p. 253.
27. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
28. See also Grier v. Kizer, supra at 254; Englemann v. State Board of Education (1991) 2 Cal.App 4th 47, 3 Cal.Rptr.2d 264, 274-5.
29. Business and Professions Code section 2530, subdivision (i). Section 2530.2, subdivision (g), defines "the practice of audiology" as follows:

" . . . the application of principles, methods, and procedures of measurement, testing, appraisal, prediction, consultation, counseling, instruction related to auditory, vestibular, and related functions and the modification of communicative disorders involving speech, language, auditory behavior or other aberrant behavior resulting from auditory dysfunction; and the planning, directing, conducting, supervising, or participating in programs of identification of auditory disorders, hearing conservation, aural

habilitation, and rehabilitation, including, hearing aid recommendation and evaluation procedures such as, but not limited to, specifying amplification requirements and evaluation of the results thereof, auditory training, and speech reading." [Emphasis added.]

30. Ibid., sections 2532, subdivision (a) and 2533.3.
31. Note that while Business and Professions Code section 3361 requires an applicant to obtain "an average of 70% in every subject," the quoted provision requires the applicant to obtain "a minimum score of 70% in each section of the written test."
32. The Division argues that the critical skill areas are steps in the practical examination process which build upon themselves. For instance, failure to successfully complete step number one means automatic failure of the other steps since the applicant would not be able to proceed. Even assuming this is true, successful completion of all steps but the last should entitle the applicant to a high "average" score.
33. The Division contends that two of the "critical skill areas" outlined in the examination information material repeats the areas covered in regulation section 1399.120, subsection (f)(2), Title 16 of the CCR. That argument does not aid the Division. Regulation section 1399.120 merely lists procedures and use of instruments and equipment which will be covered in the proficiency examination. It does not require an applicant to successfully complete any of the listed areas of skill.

With respect to the other "critical skill areas," the Division takes the view that there should be no argument that the designated skills are crucial for the correct fitting of a hearing aid. We do not question whether the establishment of the "critical skills areas" or the requirement of demonstrated competence in each of those areas is appropriate. The issue is whether HADEC can properly adopt such policy without compliance with the APA. We have decided that it cannot.

34. Government Code sections 11347 & 11347.1.
35. Government Code section 11346.
36. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

- a. Rules relating only to the internal

management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353

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("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like Grier v. Kizer, 1990 OAL Determination No. 6 rejected the idea that City of San Joaquin (cited above) was still good law.

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

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